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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1019

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
*Petitioner,*

v.

MOORE OF BEDFORD, INC. AND
NATIONAL LABOR RELATIONS BOARD,
*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

## BRIEF FOR RESPONDENT MOORE OF BEDFORD, INC. IN OPPOSITION

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### QUESTION PRESENTED

Whether the Court of Appeals properly found (1) that there was insufficient evidence to support the Board's finding that the Company's bargaining proposal relating to arbitration of incentive rates trans-

gressed its bargaining obligation under the Act; and (2) that the Board's order was in violation of Section 8(d) of the Act and the Court's holding in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

## STATUTES INVOLVED

In addition to the statutory provisions cited by Petitioner (Petition, p. 3), Respondent Moore of Bedford, Inc. also cites the following provision: Section 8(d) of the Act, 29 U.S.C. § 158(d):

> "(d) For the purposes of this Section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession* . . ." (Emphasis added).

## STATEMENT OF THE CASE

The Company and Union had enjoyed what the Trial Examiner of the Board termed "20 years of amicable and fruitful collective bargaining" since the Union's certification in 1948 (App., 25a).[1]

The Company is a small furniture enterprise in Bedford, Virginia, employing approximately 130 employees, about two-thirds of whom were paid at incentive piece work rates.[2] There are over 200 piece work rates in effect in the plant. These rates had his-

[1] "App." citations are to the Appendix attached to the Petition.

[2] The others were hourly paid.

torically been set and reset by the Company through time study and other industrial engineering techniques (App., 3a-4a, 27a).[2]

Prior to the 1968 negotiations, the collective bargaining agreement between the parties guaranteed the incentive employees at least $1.70 per hour, although the piece rates established by the Company resulted generally in actual earnings in excess of $1.70 per hour (App., 29a). The prior contract also contained a grievance and arbitration clause. Over the years issues arising as to individual piece rates had always been amicably settled through the grievance procedure. In 1968, however, the Union took four individual grievances to arbitration (App., 5a, 27a-28a). While acknowledging that he could not "set even a single rate," the arbitrator remanded the matter to the parties to work out a settlement, which was done (App., 29a). The arbitrator's ruling opened up the prospect of arbitrating the large number of individual piece rates without, as he admitted, any objective arbitral standard in the contract to guide his judgment.

When the parties met for bargaining in December of 1968, one of the Company's contract proposals was to establish a contractual standard for arbitration—which was that the incentive worker with the exercise of incentive effort could earn at least the established base rate for the job "under the least adverse conditions possible—." The right to earn at least the base

[2] Petitioner misrepresents the facts when it states that piece work rates were set "so that their yield would be reflective of each employee's prior actual earnings" (Pet., p. 5). No incentive system can operate in this fashion. Since such a system would obviously require different piece rates for the same job for each employee, it would be clearly discriminatory and impossible to administer.

rate was to be enforceable through arbitration (App., 5a, 31a).[4]

The Company also offered to increase the base rates for the various piece-rate jobs, offering base rates ranging from $1.80 to $2.25 per hour. The Company was flexible on these rates and attempted to negotiate on them (App., 8a-9a). But the Union adamantly refused to negotiate on the base rates. At one juncture, Dermoncourt, the Union Negotiator, stated that he would not negotiate on this basis even if he was offered $1.00 per hour increase in base rates—which, incidentally, would have raised the base rates to a level above the composite average earnings of all piece-rate workers.

In addition, the Company offered a 5½ percent increase in piece rates and agreed to put in writing that no existing piece rates would be lowered. The Company further offered to permit a Union time-study man to participate in job studies for the establishment of new piece rates. The Company also offered other economic concessions, and had other concessions which it was prepared to offer but was prevented from making them because of the Union's action in calling a premature strike in the midst of a bargaining session (App., 8a).

The Union's position on this issue was clearly revealed as an all-out onslaught against the entire incentive system. The Union proposed, alternatively, either that the incentive system be scrapped in favor of straight hourly rates or that incentive workers be guaranteed their past average earnings. The Board, itself,

[4] In explaining its proposal, the Company made it clear that there would be no restriction on the filing and discussion of grievances.

found that the Union was unwilling to "compromise" this adamant position (App., 14a).

The record showed that the Company proposal on piece-rate arbitration was less restrictive than a contract clause already accepted by this Union at a different employer's plant (Craddock-Terry) in the same area, which excluded piece rates from arbitration completely (App., 20a-21a). In addition the Company's proposal was almost identical to similar piece-rate arbitration clauses negotiated by this Company with another Union, the United Furniture Workers, at the Company's other plant in Greeneville, Tennessee. The petition completely omits these pertinent facts.

The Company on January 6, 1969 gave the Union an alternate offer and committed the offer in writing on January 9. The Company's alternate offer was for a two-year contract with lesser wage rate increases, *but including a reversion to the same arbitration language as appeared in the expired contract* (App., 19a-20a).

Despite this second alternative offer, which the Union never discussed with the employees, the Union called a strike in the midst of a bargaining session on January 28, 1969 before the Company had a chance to make other bargaining proposals (App., 8a, 19a-20a).

On December 18, 1969 the Union informed the Company that the strike was over and that the strikers wished to be reinstated. All of the strikers have by now either returned to work or stated that they did not wish to return after being offered reinstatement by the Company (App., 43a, 45a). Under the Board's order, however, the onus of the strike and a staggering backpay liability would be imposed on this small Company.

The Trial Examiner and the Board majority found that the Company's proposal on piece-rate arbitration was an unlawful refusal to bargain, without even purporting to assess the Company's overall good faith.

Neither the Trial Examiner or the Board majority questioned the overall good faith of the Company. Rather, the Examiner acknowledged that:

> "[T]he issue is a relatively narrow one and . . . if there was nothing wrong with the Respondent's adamant position in its resolve to change Article VI, Section 4, of the old contract, the complaint must be dismissed" (App., 30a).

And that:

> "[I]n no other respect is there direct evidence of antiunion animus or illegal conduct" (App., 30a).

Board Chairman Miller dissented holding that the Trial Examiner and the Board majority had "erred, both as to the facts and the law." He found that the Company proposed only to "revise the contract language so as to permit it greater flexibility in changing rates so long as a specified earning level was maintained."

He concluded that:

> "It is not, in my view, illegal for an employer to insist on channeling piece-rate disputes in the manner proposed, so long as the earnings level figure [the base rates] is negotiated in good faith. . . " (App., 18a-21a).

The court below reversed the Board and denied enforcement on two grounds.

The court held that it was not clear that the Company had insisted on its arbitration proposal, but, even if it

had, there was not substantial evidence on the record as a whole to support a finding that such insistence was an unfair labor practice (App., 3a).

The court rejected the Board majority's conclusion that the Company's proposal amounted to a demand for unilateral control over wages. The court pointed out that the Company had offered substantial increases in the base rates and had offered to negotiate these base rates, and that the Company's last proposal on base rates was the last only because the Union went on strike shortly after it was made. The Board majority's holding was based entirely on the "theory" that the base rates offered were so low as to be meaningless but since the record clearly showed that the base rates were fully negotiable there was no evidentiary predicate for the Board's conclusion that the Company refused to negotiate on wages (App., 7a-9a).

As a second ground, the court below held that the Board's order, as framed by the majority, "actually requires the Company either to abandon its proposed contract provision and accept the old contract provision as interpreted by the arbitrator or to accept straight hourly wages for all employees" (App., 9a). The court held that the Board's order, therefore, would violate Section 8(d) of the Act and the ruling of the Court in *H. K. Porter* v. *NLRB*, 397 U. S. 99 (1970) (App., 10a).

The court below also cited *Tex-Tan Welhausen Co.* v. *NLRB*, 434 F.2d 405 (C.A. 5, 1970), where, upon remand from the Court under *H. K. Porter*, the Fifth Circuit Court struck down an almost identical order (App., 10a).

## ARGUMENT

### 1. The Decision Below Is Clearly Correct

On the facts of the case, the decision of the court below was clearly correct. Indeed, any other result would have violated principles established by the Court in *NLRB* v. *American National Insurance*, 343 U. S. 395 (1952), *NLRB* v. *Wooster Division of Borg-Warner Corporation*, 356 U. S. 342 (1958), and *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99 (1970).[5]

As the court below perceived, this was an unexceptional bargaining dispute over contract terms in the resolution of which the Board has no enforcement role to play. The issue came down to a disagreement over the standard of arbitration of piece rates, and since arbitration is a matter of agreement, this was an issue on which neither party was required to yield. The Court said in *Steelworkers* v. *Warrior & Gulf Navigation Company*, 363 U. S. 574, 582 (1960):

> "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

Contrary to *American National Insurance*, *Borg-Warner*, and *H. K. Porter*, the Board here singled out one Company bargaining proposal on a mandatory subject for bargaining and branded it unlawful without even the pretense of assessing the Company's overall good faith.

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[5] In *Borg-Warner*, the Court said: "Read together, these provisions [§§ 8(a)(5) and 8(d)] establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment . . . .' The duty is limited to these subjects, and within that area neither party is legally obligated to yield." *Borg-Warner*, 356 U.S. at 349.

The Board majority sought to defend its ruling in the court below by arguing that the Company was refusing to negotiate over wages. But, as the court below properly found, the Company was at all times willing and took the initiative in attempting to negotiate the base job rates. The Union, on its part, refused to negotiate the base rates and called a strike in mid-bargaining in an attempt to force the Company either to guarantee each employee his average earnings or to "accept straight hourly wages for all employees" (App., 9a). In view of the Company's willingness to negotiate the base rates, the court below found that there was no basis for the Board's finding that the base rates as originally proposed were too low in relation to the past average earnings of piece-rate workers.

Under these circumstances, the court below correctly held that there was not substantial evidence on the record as a whole to support the Board's finding. Moreover, as the court below found, the Board's order requiring the Company to remove a lawful proposal on a mandatory subject from the bargaining table and accept the Union proposal was clearly in contravention of *H. K. Porter*, and specifically of the ruling on remand in *Tex Tan*.

**2. Petitioner Advances No Valid Reason for Granting the Writ**

There is no claim of conflict in Circuits and no claim that the case presents an important question of federal law not heretofore decided by the Court.

*The Universal Camera Argument.*

Stripped of its rhetorical flourishes, Petitioner's claim is that the decision below in some way "blatantly disregards this Court's decision in *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951) . . ." (Pet., p. 11).

Petitioner overlooks the fact that *Universal Camera* was basically an instruction to the Courts of Appeal to assume a more meaningful role in the review of Board decisions. The Court made this explicit:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable bounds." 340 U. S. at 490.

The Court then made it plain that the gravamen of this reviewing responsibility was the enforcement of the substantial evidence rule:

> "That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals." 340 U. S. at 490.

The Court concluded:

> This Court will intervene only in what ought to be the rare instance when the standard [substantial evidence on the record as a whole] appears to have been misapprehended or grossly misapplied." 340 U. S. at 491.

We believe that we have shown that the decision of the court below was eminently sound and was a proper application of the substantial evidence rule. The Board majority's holding that the Company demanded unilateral control of wages simply could not be squared

with the uncontroverted evidence which showed Company willingness and Union unwillingness to negotiate the base rates. Moreover, since the Board's order concededly required the Company to abandon a lawful bargaining proposal on a mandatory bargaining subject, the order could not stand in the face of the governing principles enunciated by the Court in *American National Insurance* and *H. K. Porter*.

Petitioner makes the wholly frivolous argument that the court below should have bowed to the Board's judgment because of the Board's alleged "expertise" in comprehending the "testimony by skilled industrial engineers and other experts in furniture—piece-rate bargaining." Petition, p. 11.

In reality, the single expert witness on piece-rates was a Company witness. But, more important, the issues here do not turn on the complexities of piece rates but on the application of statutory evidentiary standards to the facts of the case. This is a "conventional judicial function," as the Court said in *Universal Camera*, which Congress has placed in the keeping of the Courts of Appeals.

The concerted attack by Petitioner and *Amicus* on the court below is an outright calumny not worthy of response.

Petitioner's "win and loss" record in four cases presenting widely varying issues can hardly provide a rational basis for a sweeping indictment of the court. Cases are not decided by the numbers but by the particular facts and the applicable law. We note, however, that a recent statistical analysis made to the Board shows that the Fourth Circuit Court of Appeals enforced the Board's order in 72.4 percent of the 29

Board decisions coming before it for enforcement or review in fiscal 1971, placing it at the exact mid-point among the 11 Courts of Appeal.[6]

Petitioner cannot make up for the total lack of merit in its case by mounting a wholly gratuitous polemic against the Court of Appeals.

## CONCLUSION

For the foregoing reasons Respondent Moore of Bedford respectfully requests that the Court deny the petition of the Textile Workers Union of America, AFL-CIO for a writ of certiorari to review the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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[6] Report of Peter G. Nash, General Counsel, to the Board entitled "Statistical Report on Litigation During Fiscal Year 1971", dated September 1, 1971, p. 2.